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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNIMILLS B.V. and
MARGARINE VERKAUFS UNION GmbH,
Petitioners

VERSUS

STATISTIX SHIPPING, N.V.,
ARTH. H. MATHIESEN and
REDERI A/S MASCOT
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether The Ruling In *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.Ct. 134, 72 L.ed 290 (1927), Should Be Applied To Prevent Recovery In Tort For Purely Economic Damages Only In Those Actions Presenting A Realistic Prospect That A Judgment Allowing Recovery Would Give Rise To An Indeterminate Number of Claims By An Indeterminate Number Of Claimants.

2. Whether Recovery By A Shipper From A Tort-Feasor For Out-Of-Pocket Collision Expenditures Benefiting A Voyage Should Be Allowed Under The Concept Of Common Venture, By Which Cargo Interests Are Said To Derive Rights Outside A Charter Party Or Contract Of Affreightment, Even Though Cargo Is Not Physically On Board A Vessel At The Time Of Collision.

3. Whether The Exceptions Provision In A Charter Party, Incorporating Sections 1301 And 1304 Of The Carriage Of Goods By Sea Act, 46 U.S.C. §1301, Has Any Effect Where No Common Venture Yet Exists, Or, In Any Event, Where There Is No Determination That A Carrier Exercised Due Diligence In Making The Vessel Seaworthy At The Commencement Of The Voyage.

PARTIES TO THE PROCEEDING

Unimills B.V.
Margarine Verkaufs Union GmbH.
Arth. H. Mathiesen
Rederi A/S MASCOT
Statistix Shipping N.V.
M/V OBELIX, *in rem*
M/V BARBRO, *in rem*

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Unimills B.V. and Margarine Verkaufs Union GmbH ("petitioners") respectfully pray for the issuance of an order granting *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings

on May 22, 1987. Petition for Rehearing and Suggestion for Rehearing En Banc were denied on June 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, dated May 22, 1987 is not yet reported in an official reporter, but is reprinted at page A-1 in the Appendix hereto. The Notice of the Order on the Petition for Rehearing, dated June 23, 1987, appears at page A-10 of the Appendix. The order of the District Court granting summary judgment in favor of Respondents is reprinted at page A-12 of the Appendix.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). The judgment of the Court of Appeals for the Fifth Circuit of which review is sought was made and entered on May 22, 1987. A petition for rehearing and a suggestion for rehearing en banc filed by petitioners were denied on June 23, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Ruling In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.ed 290 (1927), Should Be Applied To Prevent Recovery In Tort For Purely Economic Damages Only In Those Actions Presenting A Realistic Prospect That A Judgment Allowing Recovery Would Give Rise To An Indeterminate Number of Claims By An Indeterminate Number Of Claimants.

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STATUTORY PROVISIONS INVOLVED

The statute involved is 46 U.S.C. §1304, the Carriage of Goods by Sea Act, which provides in pertinent part:

> Neither the carrier nor the ship shall be responsible for a loss or damage arising or resulting from--
>
> (a) Act, neglect or default of the master mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
>
> * * *
>
> (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier * * *.

STATEMENT OF THE CASE

On May 4, 1980, the M/V BARBRO, a 56,916.96 gross ton bulk carrier owned by respondents Arth. H. Mathiesen and Rederi A/S MASCOT lay in ballast at anchor at 9 Mile Point Anchorage in the Mississippi River. She was awaiting a loading berth at Peavey Company Grain Elevator, St. Elmo—Paulina, Louisiana. The OBELIX, a 60,670 gross ton tanker owned by respondent Statistix Shipping N.V. lay anchored a short distance above the BARBRO awaiting an open berth at Norco Refinery, St. James, Louisiana. At approximately 1500 hours, the OBELIX attempted to depart the anchorage with the assistance of tugs, went out of control and fell upon the BARBRO, and came to rest on top of the BARBRO's anchor chains. The two vessels were not separated until May 22, 1980. Consequently, the BARBRO could not be loaded with the petitioners' cargo of soybeans until June 3-6, 1980. Peavey Company charged Unimills and Margarine carrying charges for storage of their cargo at the loading elevator and interest totalling $465,932.39.

The BARBRO ultimately sailed to Europort/Rotterdam with the cargo in question. However, in order to meet milling requirements as dictated by the Unimills-Margarine crushing program, Unimills and Margarine had to obtain soybean from other sources on the spot market.

Petitioners are not claiming as damages difference in the cost of beans purchased on the spot market as compared to those purchased from Peavey. When the BARBRO arrived in Europe, however, the soybeans could not be used immediately and resulted in an excess. Petitioners are seeking to recover $596,913.46 in storage and interest costs related to the storage of the BARBRO beans in Europe.

The Complaint of Unimills and Magarine describes each of the petitioners as being separate corporations or other legal entities, and allocates the charter hire claim to Unimills and the claim for carrying charges, storage and interest to Margarine as owner of the cargo. Although the BARBRO charter party was signed in the name of Unimills and the cargo was purchased in the name of Margarine, both Unimills and Margarine were responsible for incurring the charges at issue. This fact was made manifest to the Court of Appeals, but was considered immaterial to its resolution of the case.

The District Court dismissed the claims of Unimills and Margarine by summary judgment, based on a trio of decisions, *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) *cert. denied*, under the name *White v. M/V TESTBANK*, ____U.S.____, 106 S.Ct. 3271, 91 L.Ed 2d 562 (1986); and *Cargill, Inc. v. Doxford & Sunderland, Ltd.*, 782 F.2d 496 (5th Cir. 1986). The Court of Appeals affirmed in a written opinion without benefit of oral argument. Petitioners' timely filed Petition for Rehearing and Suggestion for Rehearing En Banc were denied, without opinion.

JURISDICTION BELOW

Jurisdiction in the trial court was founded on the admiralty and maritime jurisdiction of the courts of the United States as conferred by Section 1333 of Title 28 of the United States Code. The claim was designated an admiralty and maritime claim under Rule 9(h) of the Federal Rules of Civil Procedure. Jurisdiction in the Court of Appeals was founded on Section 1291 of Title 28 of the United States Code.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Ruling in *Robins Dry Dock & Repair Co.*

v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.ed 290 (1927), Should Be Applied To Prevent Recovery In Tort For Purely Economic Damages Only In Those Actions Presenting A Realistic Prospect That A Judgment Allowing Recovery Would Give Rise To An Indeterminate Number Of Claims By An Indeterminate Number Of Claimants.

Petitioners are seeking to recover from the vessel OBELIX their storage, interest and carrying charge expenditures occasioned by delays in sailing when the OBELIX came into collision with the BARBRO. The Court of Appeals applied the general restrictive rule set forth in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.ed 290 (1927), to deny recovery to petitioners on the ground that they lacked the right to sue the OBELIX in tort for economic damages.

In the Fifth Circuit, *Robins* has been interpreted to support the principle that there can be no recovery against a tort-feasor for economic loss by a party who has sustained no personal injury or property damage. The *Robins* case held that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at 135, 72 L.ed at 292. Specifically, this Court held in *Robins* that a time charterer could not recover against a vessel repairer for negligently repairing a chartered vessel, resulting in loss of the time charterer's anticipated profit.

Attacks questioning the desirability and wisdom of retaining the *Robins* rule arise with predictable frequency. But petitioners raise the issue here only insofar as it need be considered to resolve their claims under different principles, long accepted in admiralty courts, which should remain inviolate.

In the Fifth Circuit, *Robins* is categorically applied in tort cases with very few exceptions. *See, State ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), *cert. denied* under the name *White v. M/V TESTBANK*, ____U.S.____, 106 S.Ct. 3271, 91 L.Ed.2d 562. The Fifth Circuit Court has characterized the rule as being "conceptually pure" and as serving a normative function by offering predictability and allowing courts to judicially resolve cases rather than simply manage the administration of claims. The Court more accurately acknowledged elsewhere in the *TESTBANK* case that "*Robins* is a pragmatic limitation on the doctrine of foreseeability." 752 F.2d at 1032. The appeal of *Robins* arises from its utility, not its logical purity.

As stated by Professor James, *Robins* is helpful primarily in confronting disputes where allowing recovery to one party would raise the specter of an indeterminate number of claims being brought by an indeterminate number of parties for an indeterminate time. James, "Limitations on Liability For Economic Loss Caused by Negligence: A Pragmatic Approach," 25 Vand. L.Rev. 43, (1972). The current impact of the *Robins* rule is felt well beyond the problem cases. Even where *Robins* does not appear a necessary solution, it is applied. *Id.* at 57. The final result in such cases is punishment of innocent injured parties by forcing them to shoulder their actual economic losses and relief to wrongdoers of their legal responsibility.

Petitioners submit that in cases like their own a wrong worse than increased administrative responsibilities on the trial courts results by applying the rule. Moreover, where the spawning of an indeterminate number of lawsuits is not a real prospect, no rational reason to apply the rule exists.

Those types of actions presenting such a prospect can be readily identified, and regularly are identified in many cases where *Robins* is cited. Recently this Court recognized, for example, that the allowance of recovery in product liability cases would open manufacturers to claims for vast sums by remote parties, with no distinctive, logical cutoff point. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, ____U.S.____, 106 S.Ct. 2295, 90 L.Ed 2d 865 (1986). The same conclusion has been reached in river blockage cases, bridge damage cases and waterway pollution cases. *See, e.g., Kingston Shipping Co., Inc. v. Roberts,* 667 F.2d 34 (11th Cir. 1982); *Louisville & Nashville R.R. Co. v. M/V BAYOU LACOMBE,* 597 F.2d 469 (5th Cir. 1979); *State of Louisiana ex rel. Guste v. M/V TESTBANK, supra,* 752 F.2d 1019.

Robins can still be given a categorical application in those proper cases. Its intended effect is not promoted, however, by resort to the rule where the threat of remote claims is not a realistic one.

Had the proper threshold inquiry been made in this case, petitioners' right to recover would have been recognized by the Court of Appeals. This Court long ago ruled that actions involving cargo claims for collision damages are not cases that should be limited by the *Robins* rule. *Aktieselskabet Cuzco v. The SUCARSECO (The TOLUMA),* 294 U.S. 394, 55 S.Ct. 467, 79 L.ed 934 (1935). Modern-day shipping voyages involve a limited number of parties, the vessel owner, cargo owner and possibly a charterer. Those are the only parties who would likely sustain the types of damages incurred in this case. The cargo interest is so inextricably bound up in the voyage that it is in no sense remote. Nothing could be more foreseeable than one or more of three parties to a venture seeking reimbursement of actual expenses from a tort to the venture.

In *The TOLUMA* case, the shipper brought suit to recover contributions made in general average to its carrying vessel which had come into collision with another. The collision damages in issue were for loading and storage of the TOLUMA's cargo while she was undergoing repairs in a port of refuge. *See,* 72 F.2d 690 (decision of the Court of Appeal in *The TOLUMA*); *Amoco Transport Company v. S/S MASON LYKES,* 768 F.2d 659, 668 (5th Cir. 1985). This Court expressly held:

> This is not a case of an attempt, by reason of "a tort to the person or property of one man," to make the tort-feasor liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong." *See, Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309, 48 S.Ct. 134, 72 L.ed 290; *Elliott Steam Tug Co., Ltd. v. The Shipping Controller,* [1922] 1 K.B. 127, 139, 142; *The Federal No. 2,* (C.C.A.) 21 F. (2d) 313. Here cargo as well as ship was placed in jeopardy. That jeopardy was due in part to the negligence of the vessel against which the claim is made.

294 U.S. at 404, 55 S.Ct. at 471. The Court further specifically held that the claim was in no sense remote, nor rendered attenuated by the fact that general average was involved.

> The nature of these expeditures and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause. The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right.* * * [T]he right arises directly from the tort.

294 U.S. at 404, 55 S.Ct. at 471.

The result in *The TOLUMA* accords with acknowledged maritime precedents allowing full restitution of damages caused by a collision. The Court of Appeals' decision in the case at bar has the opposite effect and is in fundamental conflict with long-recognized maritime rights. Owners and shippers of cargo have traditionally been allowed to sue non-carrying vessels which come into collision with vessels carrying the cargo. *The ATLAS*, 93 U.S. 302, 316, 317, 23 L.ed 863 (1876); The *NEW YORK*, 175 U.S. 187, 209, 210, 44 L.ed 126 (1899). The damages recoverable by cargo interests traditionally include expenses for preservation of the cargo, additional shipment arrangements and insurance. *The SCOTLAND*, 105 U.S. 24, 35 (1881); *The ENERGIA*, 66 F. 604, 608 (2d Cir. 1895). As stated in *The ENERGIA, supra*, the general maritime collision precept *restitutio in integrum*, commanding full restitution of all damages in collision cases, applies to cargo interests as well as the involved vessels. 66 F. at 608.

Because the BARBRO was detained at anchorage when the OBELIX fell down upon her, and because she could not extricate herself and proceed to her loading berth, petitioners incurred additional charges from the grain elevator until such time as the vessels could be separated and repairs to the BARBRO completed. Had the BARBRO been loaded as scheduled, none of these expenditures would have been necessary. Similarly, storing the cargo upon the completion of the voyage to Rotterdam would have been rendered unnecessary. Petitioners maintain that the OBELIX was unseaworthy and negligently navigated and managed upon entering the anchorage where the BARBRO lay. Petitioners are merely attempting to recover losses for which the OBELIX is claimed to be responsible. In that view, petitioners should be entitled to prove the merits of their claim to entitlement of recovery. *See, The Toluma, supra*, 294 U.S. at 405, 55 S.Ct. at 472.

There is no question that the damages sought to be recovered by petitioners would be held foreseeable, direct and actual consequences of the collision. Expenses for storage of cargo have long been recognized as "actual losses and the result of the collision." *The JOSEPH NIXON v. The GEORGE LYSLE,* 2 F. 259 (W.D. Pa. 1880); *The ENERGIA, supra,* 66 F. at 608. As the Court of Appeals for the Fifth Circuit stated in *The MASON LYKES, supra,* they are "expenses arising directly from the collision, expenses for which the negligent, non-carrying vessel would have been liable even in the absence of a general average right by the vessel owners against the cargo interests." 768 F.2d at 666. *The TOLUMA* allowed these very expenses to be included in the general average accounting, and stated "the right to that inclusion springs directly from the tort and in that relation no question is raised as to proximate cause or foreseeable consequences." 294 U.S. at 404, 55 S.Ct. at 471.

Injury to the owners of cargo to be shipped aboard a vessel contracted for that purpose is clearly to be foreseen if that vessel should collide with another. Persons in the ocean transport industry are charged with the knowledge that third-party non-vessel owners commonly charter vessels or rent space thereon. As was recognized in *The AVELINA,* 1950 A.M.C. 1264 (5th Cir. 1950), "the general owner must be taken to know that the purpose for which his vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons."

The interest, carrying charges and storage expenses incurred in New Orleans and in Europe were entirely the foreseeable and direct result of the collision and subsequent involvement of the BARBRO and OBELIX. Recovery of these expenses would comport with the expectancies of maritime commercial interests. Denial of recovery would come as a disastrous surprise.

2. Recovery By A Shipper From A Tort-Feasor For Out-Of-Pocket Expenditures Benefiting A Voyage Should Be Allowed Under The Concept Of Common Venture, By Which Cargo Interests Are Said To Derive Rights Outside A Charter Party Or Contract Of Affreightment, Even Though Cargo Is Not Physically On Board A Vessel At The Time Of Collision.

The TOLUMA has been interpreted to to allow cargo interests to recover damages directly resulting from a collision even where there is no physical damage to the cargo. *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974); *Amoco Transport Company v. S/S MASON LYKES, supra*, 768 F.2d 659, 666; *Cargill, Inc. v. Doxford & Sunderland, Ltd.*, 758 F.2d 1296 (5th Cir. 1986).

Following its own holdings in the *Cargill* and MASON LYKES cases, the Court of Appeals in the case at bar recognized that "[t]he *Robins Dry Dock* rubric does not bar the recovery of losses by the owner of the cargo when the carrying vessel is involved in a collision, albeit the cargo itself is not damaged." Appendix, p. A-4.

The Court read *The TOLUMA*, however, to require the existence of a "common venture" as a requisite to recovery by cargo interests. The Court broke new ground in holding that such a common venture can exist only when the vessel has been loaded with the cargo. This last holding, petitioners submit, deviates too widely from the principles favoring recovery set forth in *The TOLUMA* and recognized applications of the theory of general average.

Petitioners freely acknowledge that their cargo was not on board the BARBRO when the collision occurred and that the cargo was not physically damaged in the collision. But the BARBRO received unquestionable benefit from

petitioners' actions in response to the collision. The expenses they incurred averted greater loss to the participants in the BARBRO voyage. Had the grain elevator refused ultimately to load the cargo, the voyage might then have been aborted, resulting in loss of BARBRO's charter hire, to BARBRO's obvious detriment. Had petitioners been unwilling to incur the expense of storage when the cargo was ultimately delivered in Rotterdam, the soybeans would have been subject to possible pilferage or spoilage, or may have been made the subject of sale at a distressed price, leaving BARBRO open to a claim under a theory of breach of charter party.

The common venture concept is relied upon to justify the practical accounting mechanism of general average in collision cases. Cargo can be called upon to contribute to expenditures incurred by the carrying vessel where the vessel had come into collision with another so long as the expenditures were made to the common benefit. Cargo interests must share the responsibility for the expenses, even though they may have physicially benefited only the vessel and even though cargo interests did not approve them in advance. In a sense, cargo has impliedly consented to the expenditures because it is assumed cargo would want the voyage venture to proceed so both vessel and cargo might receive the benefits of the venture. *See,* 2A *Benedict on Admiralty,* §35 at 4-17 (6th ed. 1985); Gilmore & Black, *The Law of Admiralty,* 244 (2d ed. 1975).

The cargo's right to recover its contributions "accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expenses incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision." *The TOLUMA,* 294 U.S. at 404, 55 S.Ct. at 471.

The Court of Appeals concluded that allowing petitioners' claim would do "violence to the essence of the notion of common venture between cargo and carrier, because prior to the time the cargo is loaded there is no sharing of risks of the sea and of the obligation of general average." Appendix, p. A-5, A-6. The Court of Appeals, thus, was unwilling to recognize that the actions taken by petitioners which unquestionably benefited BARBRO and allowed the voyage to go forward to a successful conclusion could be considered in the context of common venture.

General average has been resorted to in maritime collisions since the time of the Romans. Yet this Court has not been called upon specifically to decide the issue posed by the Court of Appeals' decision: whether general average may arise as a result of a peril to the venture other than a physical danger to both the vessel and cargo. The Fifth Circuit Court would limit general average to situations where the cargo is actually in danger of physical damage by the colliding vessel, the incursion of sea water from collision or stranding, jettision, pilferage by pirates and the like. It would rule out general average when the event at sea results in delays in shipment which themselves could cause physical damage to the cargo or the venture as a whole.

This Court has not heretofore conditioned cargo's recovery on the existence of a threat of immediate physical injury to the cargo while aboard the vessel. *The TOLUMA* decision requires only that (1) the nature of the expenditures be of a type incurred because of cargo's own participation in the common adventure and made in the common interest of the participants to the adventure; and (2) the expenditures directly result from the collision. Although cargo was aboard the TOLUMA at the time the SUCARSECO collided with it, this fact was not held to be

material. Instead, this Court was concerned with "the nature of the general average contributions, and of the event which made them necessary." 294 U.S. at 405, 55 S.Ct. at 471.

The peril faced by the adventure need not be a direct peril of the sea to the cargo. It may be a peril to the continued and successful resolution of the venture. As the Second Circuit Court of Appeals properly noted in its decision of *The TOLUMA*, which this Court affirmed,

> Sacrifices made *after* the safety *of the venture* has been imperiled and made to save as much as possible from the threatened danger of loss and to save that for the benefit of all, is the basis of a general average of the sacrifice among all concerned. * * * So such expenses, when occasioned by the fault of a stranger, are incurred by cargo * * * as sacrifices made to make it possible *to complete the voyage and avert greater loss.*

72 F.2d at 695 (emphasis added).

Petitioners submit that under the reasoning of *The TOLUMA* there is a necessary relationship between the peril and the expenditures, since only expenditures necessitated by the peril will be allowed. The peril, then, is significant only in its relation as the proximate cause of the expenditures. *The TOLUMA* also teaches that expenditures for preserving the cargo *after* the vessel has reached a port of refuge are allowable in general average. The same holds true for reshipment expenses and the cost of insurance necessitated by the preservation efforts. As stated in *The ENERGIA, supra*,

> The necessity of paying out money in order to enable surviving cargo to secure transportation to its original destination on the vessel by which it was shipped arose here. * * * It was an expense

> which was the necessary result of the collision; it "arose" at the moment of the collision; and it is immaterial when it is paid.

66 F. at 608.

Under English law, general average obligations can arise before cargo is loaded aboard. Chartered freight, the amount the owner of the goods pays the voyage charterer, may have to contribute to general average where a general average sacrifice occurs during a ballast voyage and *before the cargo is loaded.* Lowndes & Rudolf, *General Average and the York Antwerp Rules,* 201 (10th ed.); 2 Arnould, *Law of Marine Insurance and Average,* 862-863 (16th ed.); 2 Carver, *Carriage by Sea,* 1047 (13th ed). The principle was derived from *Williams v. London Assurance Co.,* (1813) 1 M.&S. 318, where a general average situation occurred on the outward voyage of a vessel which was chartered for a voyage out and home, with a stipulation that freight was to be paid on the amount of cargo she carried on the homeward voyage if the cargo was ultimately delivered safely. The Court held that the whole freight payable under the charter party was an indivisible sum, payable for the use of the ship out and home. "[T]herefore, when ultimately earned, having been put to hazard and saved by the measures taken for the general benefit, it ought to contribute." *Arnould, supra,* 862.

In *S.S. Carisbrook Co. V. London and Provincial Mar. Ins. Co.,* [1901] 2 K.B. 861, [1902] 2 K.B. 681 (C.A.), the Court of Appeal held that chartered freight had to contribute to the general average sacrifice which became necessary during an outward voyage in ballast and without cargo. It was held that the chartered freight was no less at risk during the outward unloaded voyage, when the sacrifice was made, than during the voyage homewards. The Court of Appeal (Collins, M. R.), stated:

> The vessel in a round charter such as this is earning the only freight that is payable from the moment it breaks ground down to the time it delivers the cargo at the ultimate port. *It is in process of earning that freight just as much before the goods are put on board as after,* and just as its ability to earn it would be defeated if the adventure were stopped short by some peril a fortnight after it started, so also it would be defeated if it met with a similar peril one day before it could reach the port of destination, and, where there is a general average sacrifice ten days after she starts, it seems to me there can be no distinction of principle between that sacrifice and a sacrifice occuring two days before she would arrive. *What is at risk in both cases is the same, namely, the ability of the ship to consummate the whole undertaking in safety.*

2 K.B. at 690 (emphasis added). *See, Arnould, supra,* at 863.

The chartered freight in the case at bar was at petitioners' risk, not the vessel's. The BARBRO charter party required that petitioners prepay the freight on signing bills of lading; that the prepaid freight was "not returnable, vessel and/or cargo lost or not lost;" and that freight was to be deemed earned as cargo was loaded aboard.

> [W]hen it is stipulated by the charter party that the freight, instead of depending upon the completion of the voyage shall be absolutely prepaid, the risk shifts to the charterer.
>
> * * *
>
> [T]he charterer, and not the ship owner, is the party liable under English law to contribute to general average in respect of prepaid freight.* * *

Lowndes & Rudolf, *supra,* 207.

Whether or not this Court agrees in general with the reasoning or wisdom of the above-cited English authorities, petitioners submit the common venture in this case must nevertheless be recognized since the petitioners' charter party with the BARBRO specifically provided for the application of English law. *See, The ENERGIA, supra,* 66 F. at 607, 608. Section 44 of the BARBRO charter party states: "Any disputes arising under this Charter shall be governed by English law."

If the Court of Appeals' holding is correct that the BARBRO is exculpated from fault by provisions in the charter party, which issue is addressed as the third reason for allowance of the writ, then the BARBRO further shifted risks of the voyage to petitioners. Paragraph 35 of the voyage charter party provides that loss, damage or delay to the cargo for causes excepted by the United States Carriage of Goods by Sea Act cannot give rise to liability on the part of the BARBRO, her masters or owners. The Court specifically held, contrary to petitioners' urgings, that this provision applied before the goods were loaded aboard the BARBRO. The Court's determination would appear to compel the conclusion that the risk of cargo loss or damage or delay had been shifted to the cargo interests before the goods were loaded aboard.

Petitioners, then, were subject to the type of "risks, rights and responsibilities of a voyage" the Court of Appeals in *Cargill, supra,* found indicative of a "common venture." *See,* 785 F.2d at 1297. The success of petitioners' participation in this venture was integrally bound up in the ability of the BARBRO to load and sail timely. The collision happened only hours before the BARBRO would have been loaded. The BARBRO had "tendered," and had been accepted by petitioners within the meaning of the charter party. Petitioners were required to load her within a specific period of time, "an absolute commitment on the

charterer's part." Anderson, "Time and Voyage Charters: Proceeding to Loading Port, Loading and Related Problems," 49 Tul. L.Rev. 880, 888 (1975). Lay days were running. Petitioners had no escape from the economic impact the abrupt interference worked to the venture. Fixing a charter with another ship would have depended on that other ship's availability, and, at best, would have resulted in further delays. Petitioners would have been placed entirely at the mercy of other ships' operating schedules.

The losses sustained by petitioners in this case resulted from vicissitudes of the venture which had progressed to the point that their economic fortunes relating to this cargo were entirely dependent on the BARBRO.

3. The Exceptions Provision In The Charter Party, Incorporating Sections 1301 And 1304 Of The Carriage Of Goods By Sea Act, 46 U.S.C. §1301, Should Not Be Found To Preclude Recovery Where No Common Venture Yet Exists, Or, In Any Event, Where There Is No Determination That A Carrier Exercised Due Diligence In Making The Vessel Seaworthy At The Commencement Of The Voyage.

The BARBRO had a duty under the charter party to proceed with reasonable dispatch to the loading port to permit a timely loading of the soybeans. Because of the collision with the OBELIX, however, and the failure to promptly extricate itself from the situation, the BARBRO breached its obligations under the charter party. Such a finding would allow petitioners to recover all of the damages they sustained from the BARBRO interests, notwithstanding the agreed allocation of fault as between the BARBRO

interests and the OBELIX interests. *See, Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044 (5th Cir. 1981).

The Court of Appeals held that petitioners are prevented from recovering these damages directly from the BARBRO under the charter party, however, by operation of the exceptions clause in the charter party and exceptions under the Carriage of Goods by Sea Act, 46 U.S.C. §1301, 1304(2), which purport to exculpate the carrying vessel from liability to cargo for errors in nav igation. The district court did not specifically address this issue.

The statutory exceptions referenced in the BARBRO charter provide:

> Neither the carrier nor the ship shall be responsible for a loss or damage arising or resulting from--
>
> (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
>
> * * *
>
> (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier * * * .

46 U.S.C. §1304(2).

Giving effect to the exceptions provision of COGSA and the charter party depends upon a finding that the voyage was in effect at the time of the collision, and that the exceptions clause relates to the preliminary voyage as well as the carrying voyage. *Scrutton on Charter Parties and Bills of Lading*, 122 (19th Ed. 1984), citing *Hudson v. Hill*, (1874) 43 L.J.C. 273. Application of the exculpatory

provision can only be justified, however, if delays during the preliminary voyage and before loading *defeat the commercial object of the adventure. Id.* Petitioners submit that the conclusion that the common adventure had not yet begun because the cargo was not yet loaded aboard would compel the correlative conclusion that the exceptions clause and Section 1304(2) have no applicability. The Court of Appeals' decision, petitioners submit, is inherently inconsistent in this regard. Moreover, the outcome of the venture, though devalued by cargo expenses and vessel damage, was ultimately realized.

Additionally, Paragraph 35 states only that the vessel interests shall be held liable for any loss or damage or delay to the cargo for causes excepted by COGSA, namely, navigation and management of the vessel. As Paragraph 35 specifically provides, the BARBRO interests still had an obligation at the beginning of the voyage to exercise due diligence to make the ship seaworthy. *See, Intern'l Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U.S. 218, 21 S.Ct. 591 (1901). The Court concluded that "any fault on the part of BARBRO was in the navigation or management of the ship." There is no support in the record for this conclusion. The question of fault--due diligence versus negligence--was nowhere addressed.

CONCLUSION

The rule in collision cases is clear: Cargo interests are entitled to be made whole for their losses resulting from a collision even if those interests sustain no physicial damage. Expenditures made necessary by the collision and commonly benefiting the vessel and cargo can be recovered. Neither general average nor the concept of common venture makes this recovery dependent on the cargo having been aboard the vessel at the time of the collision. Recovery is also allowed against a chartered vessel for

expenditures caused by that vessel's delay in loading, notwithstanding exceptions in the charter party relating to the vessel's fault, so long as the voyage eventually resumes, particularly where the carrying vessel did not exercise the due diligence required of it by maritime law. For all of these reasons, a writ should issue to the Court of Appeals for the Fifth Circuit to review the decision at bar.

Respectfully submitted,

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PROOF OF SERVICE

I, Joseph W. Looney, one of the counsel of record for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 22nd day of August, 1987, I served three copies of the Petition for Writ of Certiorari on each opposing counsel, as follows:

1. On Statistix Shipping N.V. by mailing three copies in a duly addressed envelope, with first-class postage prepaid to W. Thaddeus Miller, Esquire, and by hand-delivery three copies to Robert B. Deane, Esquire.

2. On Arth. H. Mathiesen, Rederi A/S MASCOT and the M/V BARBRO, by hand-delivery three copies to Benjamin W. Yancey, Esquire.

It is further certified that all parties required to be served have been served, and that the list of those parties is set forth above.

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Attorney for Petitioners

APPENDIX A

Arth H. Mathiesen and Rederi A/S Mascot
Plaintiffs-Appellees,

v.

M/V OBELIX, her engines, boilers, tackle, etc. and Statistix Shipping N.V., Defendants-Appellees,

v.

UNIMILLS B.V. and Margarine Verkaufs Union GmbH, Plaintiffs-Appellants,

UNIMILLS B.V. and Margarine Verkaufs Union GmbH, Plaintiffs-Appellants,

v.

STATISTIX SHIPPING, N.V., et al., Defendants-Appellees.

NO. 86-3728
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
May 22, 1987.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

Unimills B.V. and Margarine Verkaufs Union GmbH[1] seek recovery of storage charges incurred because of a delay experienced in the loading and transportation of soybeans. That delay resulted from the collision of a vessel chartered to transport the soybeans with another vessel, prior to the time the soybeans were loaded. Applying the rule of *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed.290 (1927), the district court granted defendants' motion for summary judgment. Agreeing with that application, and finding that complainants are precluded from recovering their losses from the vessel they voyage-chartered, we affirm.

Background

Peavey International, Inc. sells soybeans from a grain elevator it operates on the banks of the Mississippi River between Baton Rouge and New Orleans. Margarine purchased a quantity of soybeans from Peavey. Unimills voyage-chartered the M/V BARBRO, a freighter of Norwegian registry, to transport the cargo to Rotterdam. The BARBRO arrived timely and dropped anchor to await access to the grain elevator. On May 4, 1980, while the BARBRO was awaiting its turn to load cargo, the M/V OBELIX, a tanker awaiting a berth at a nearby refinery, collided with the BARBRO. The two vessels were not separated by professional salvors until May 22, 1980.

As a result of the collision, the BARBRO was unable to either receive the soybeans or transport them to Rotterdam as scheduled. As a consequence, Unimills and Margarine had to purchase replacement soybeans to fulfill

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[1] The exact relationship between Unimills and Margarine is not clear from the record, but is not material to resolution of this appeal.

their commitments and they incurred delay storage charges in both the United States and Rotterdam. They seek recovery of those storage charges from either or both the BARBRO and the OBELIX. We conclude that there is no legal basis for recovery against either.

Analysis

1. Recovery in tort: *Robins Dry Dock*

[1] This case poses the conundrum which arises when "the defendant commits a tort causing physicial harm to A which also results in an interference with B's contract rights without actually causing physicial harm to B." *Prosser and Keeton on the Law of Torts*, § 129, p. 997 (5th ed. 1984). What rights, if any, do Unimills and Margarine have to recover losses caused by damage to the vessel they chartered to carry their cargo, prior to the loading of their cargo?

Under the venerable rule of *Robins Dry Dock* they have none. As stated by Justice Holmes, in rejecting the demands of a time charterer for damages arising out of delays in repairs by a negligent shipyard:

> [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. * * * The law does not spread its protection so far (citations omitted).

Robins Dry Dock, 275 U.S. at 309, 48 S.Ct. at 135, 72 L.Ed.

at 292. Although eloquently critized for its rigidity, [2] the rule has persisted because it offers a brightline application in an otherwise murky area.[3] Thus as this court, sitting en banc, has recently reaffirmed, physical damage to a proprietary interest, except in very limited instances, is a prerequisite to recovery for economic loss in cases of unintentional maritime tort. *State of Louisiana ex. rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc).

The *Robins Dry Dock* rubric does not bar the recovery of losses by the owner of the cargo when the carrying vessel is involved in a collision, albeit the cargo itself is not damaged. In that instance the shipper is embarked on a common adventure with the vessel. We distilled the applicable principles in our recent denial of rehearing in *Cargill, Inc. v. Doxford and Sunderland, Ltd.*, 785 F.2d 1296 (5th Cir. 1986):

> It is well-settled that when two ships collide, the owners of cargo on one ship may proceed in tort directly against the other, non-carrying ship. *The TOLUMA*, 294 U.S. [394] at 400, 55 S.Ct. [467] at 469-70 [79 L.Ed. 942 (1935)]; *United States v. Atlantic Mutual Ins. Co.*, 343

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[2] *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985)(en banc)(Wisdom, J., dissenting).

3 As we observed in *The MASON LYKES*, 768 F.2d 659, 669 (5th Cir. 1985):

> The spectre of runaway recovery lies at the heart of the *Robins Dry Dock* rubric. As Professors Prosser and Keeton noted in their most recent work:
>
> The policy against runaway recovery based on negligence is rooted at least in part on what Professor James has called the "pragmatic objection," that while physical harm generally has limited effects, a chain reaction occurs when economic harm is done and may produce an unending sequence of financial effects best dealt with by insurance, or by contract, or by other business planning devices [citations omitted].

> U.S. 236, 240, 72 S.Ct. 666, 668-69, 96 L.Ed. 907 (1952); *Weyerhauser S.S. Co. v. United States*, 372 U.S. 597, 604, 83 S.Ct. 926, 930, 10 L.Ed.2d 1 (1963); *O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5th Cir. 1958); *The MASON LYKES*, 768 F.2d at 668. The rule has been applied even when the cargo did not suffer any immediate physical damage in the collision. *E.g., The Toluma, supra; The MASON LYKES, supra.* This rule is founded on the notion of a "common venture," according to which ship and cargo share by law in certain of the risks, rights, and responsibilities of a voyage; the law of general average is the context in which the "common venture" concept most often arises.

Id. at 1297.

In the case at bar, Margarine and Unimills urge that we extend this doctrine by declaring the commencement of the common venture to be the time the chartered vessel departs, pursuant to the charter, to pick up the cargo. Under the rule, as appellants would have it extended, they would be permitted to seek damages in tort for all reasonable delays occasioned by the collision. While the invitation is not without appeal, it is inconsistent with this circuit's view of *Robins Dry Dock* as enunciated in *TESTBANK*.[4]

Further, the extension appellants seek does violence to the essence of the notion of common venture between cargo and carrier, because prior to the time the cargo is loaded there is no sharing of risks of the sea and of the

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[4] Although the writer personally continues to adhere to the views expressed in the *TESTBANK* dissent, the rule announced by the majority is the rule to be applied in this circuit.

obligation of general average.[5] In summarizing the common venture exception to *Robins Dry Dock*, the *Cargill* court presciently foresaw the instant case, and stated:

> It is difficult to imagine a context in which the special legal notion of a "common venture" could have any application before the cargo was loaded on the ship. *Cf.* 2A *Benedict on Admiralty* § 35 at 4-17 (6th ed. 1985). In the present case, where the negligence in repairing the SERENA's engine occurred before she was chartered to Cargill and before Cargill's grain was loaded, application of the "common venture" notion would emasculate *Robins Dry Dock*. Even if the traditional rule—permitting cargo to proceed directly against a non-carrying tortfeasor for damages arising from an injury to the carrying ship—were extended to non-collision cases, an extension that we do not here adopt or endorse, that rule can have no application where the tort to the carrying ship took place before the cargo was loaded. This case is therefore governed by *Robins Dry Dock* rather than by *The TOLUMA* or *The MASON LYKES*.

785 F.2d at 1297-98. While the absence of a charter in *Cargill* distinguishes that decision from today's case, its rationale is fully applicable. Accordingly, we hold that the rule of *Robins Dry Dock* precludes a cargo-owner from suing a tortfeasor for economic damages arising out of a collision with the vessel chartered to carry the cargo,

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5 The law of general average applies only when cargo and the vessel are exposed to a common, imminent peril of the sea, requiring loss to the cargo or vessel in order to save the voyage. F. Maraist, *Admiralty in a Nutshell* 134 (1983); G. Gilmore & C.Black, *The Law of Admiralty* 244-47 (2d ed. 1975) (quoting Barnard v. Adams, 51 U.S. (10 How.) 270, 13 L.Ed. 417 (1850).

prior to the time the cargo is loaded.

2. Contract claims

[2] Unimills and Margarine contend that even though they are foreclosed from advancing a tort action they should be permitted to sue in contract for the BARBRO's failure to receive and deliver the cargo as per their contract. Because the charter excused the BARBRO and her owners from liability arising from the negligence of other parties, as well as from the negligence of its master and crew in navigation, that claim too, founders. Paragraph 35 of the voyage-charter provides in pertinent part:

> Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to have her properly manned, equipped and supplied and neither the vessel nor the Master or Owners shall be or shall be held liable for any loss or damage *or delay* to the cargo for causes excepted by the U.S. Carriage of Goods by Sea Act, 1936 (emphasis added).

The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15, was enacted to guarantee certain minimum protections to small shippers considered to be at a bargaining disadvantage with carriers.[6] By its express terms, COGSA does not cover charter parties, 46 U.S.C. § 1305, presumably because one chartering an entire vessel enjoys sufficient bargaining clout to resist overreaching by the shipowner. But although COGSA does not apply to charter parties, it does apply to bills of lading issued under

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6 Prior to the passage of COGSA, Congress began addressing the problem in the Harter Act, 46 U.S.C. §§ 190 *et seq.*, which remains in effect where COGSA does not apply.

the charter party, and the contracting parties may stipulate to its applicability. The above quoted language incorporated COGSA's exceptions from liability into the charter of the BARBRO.

The incorporated statutory exceptions make it abundantly clear that Unimills is precluded from any recovery herein from the BARBRO. Section 1304(2) provides that:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
>
> * * * * *
>
> (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier....

It is clear from the record that the collision resulted from the fault of the BARBRO, the OBELIX, or both. Any fault on the part of the BARBRO was in the navigation or management of the ship, and recovery would be barred by § 1304(2)(a). Further, to the extent the BARBRO was prevented from accepting the cargo timely because of the fault of the OBELIX, § 1304(2)(q) intervenes. Therefore, as a matter of law, there can be no recovery against the BARBRO for breach of the charter party.

[3] Appellants argue that the COGSA exceptions should not apply until the cargo was loaded, citing § 1301(e). Were COGSA applicable by law this argument would be persuasive. However, the parties are free to contract as they wish, and in this instance they chose to apply the COGSA exceptions to the entire term of the charter. Had the parties incorporated the entirety of COGSA, a more difficult issue would have been presented, one which we do not today answer. The parties opted to include only COGSA's mutual exceptions from liability. Those exceptions were made applicable for the entirety of the charter period, not just when the cargo was in transit. *See United States v. M/V Marilena P,* 433 F.2d 164 (4th Cir. 1969) (where time charter specifically incorporated COGSA's provisions from § 1304(1), (2), and (3), those provisions controlled for the entire term of the charter, not just from loading and unloading; *compare Watermill Export, Inc., v. M/V PONCE,* 506 F.Supp. 612, 1981 A.M.C. 2457 (S.D.N.Y.1981); *In re Complaint of Norfolk, B & C Line Inc.,* 478 F.Supp. 383, 1981 A.M.C. 496 (E.D.Va.1979). We conclude that COGSA exceptions made applicable by the charter governed at the time of the collision in this case, and preclude any claims against the BARBRO and her owners under the charter party.

Because the claims in tort of Margarine and Unimills are barred by the rule of *Robins Dry Dock,* and the exclusions in the charter party preclude, as a matter of law, any recovery under that contract, the district court correctly granted summary judgment against Unimills and Margarine. Its decision is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3728

FILED
Jun 23, 1987

ARTH H. MATHIESEN and
REDERI A/S MASCOT,

Plaintiffs-Appellees,

versus

M/V OBELIX, her engines,
boilers, tackle, etc. and
STATISTIX SHIPPING, N.V.,

Defendants-Appellees.

versus

UNIMILLS B.V. and
MARGARINE VERKAUFS UNION
GmbH,

Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5-22-87, 5 Cir., 198__, _____F.2d_____)

A-11

(June 23, 1987)

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Re-hearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

REHG-6

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNIMILLS B.V. and MARGARINE VERKAUFS UNION GmbH — CIVIL ACTION No. 80-1722 SECTION: E/2 FILED Sep 12, 1986

versus

STATISTIX SHIPPING N.V. and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) LIMITED, *in personam,* and M/V OBELIX, her engines, tackle, apparel, furniture, etc., *in rem*

CONSOLIDATED WITH

STATISTIX SHIPPING N. V. — CIVIL ACTION N0. 80-5033 SECTION: E/2

versus

ARTH. H. MATHIESEN and REDERI A/S MASCOT, *in personam,* and M/V BARBRO her engines, boilers, tackle, apparel, etc., *in rem*

J U D G M E N T

The Court, having on September 10, 1986, granted defendants' and third party defendants' motion for summary judgment;

IT IS ORDERED, ADJUDGED and DECREED that there be judgment in favor of defendants in these consolidated matters, dismissing plaintiffs' suits.

New Orleans, Louisiana, this 12th day of September, 1986.

s/s Marcel Livaudais,

MARCEL LIVAUDAIS, JR.
United States District Judge

DATE OF ENTRY Sep 15 1986